

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FEB 26 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JOHN B. KENNEY,

Plaintiff-Appellant,

v.

CITY OF SAN DIEGO; et al.,

Defendants-Appellees.

No. 18-55916

D.C. No.

3:13-cv-00248-WQH-AGS

Southern District of California,  
San Diego

ORDER

Before: GOODWIN, SCHROEDER, and SILVERMAN, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing.

The panel unanimously recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing is DENIED and his petition for rehearing en banc is DENIED.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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JOHN B. KENNEY,

No. 18-55916

Plaintiff-Appellant,

D.C. No.

v.

3:13-cv-00248-WQH-AGS

CITY OF SAN DIEGO; et al.,

MEMORANDUM\*

Defendants-Appellees.

Appeal from the United States District Court  
for the Southern District of California  
William Q. Hayes, District Judge, Presiding

Submitted November 23, 2020\*

Before: GOODWIN, SCHROEDER, and SILVERMAN, Circuit Judges.

John B. Kenney appeals the district court's judgment, following a jury trial, in Kenney's action under 42 U.S.C. § 1983 alleging constitutional and state-law claims stemming from his participation in the Occupy San Diego protests in 2011 and 2012. We have jurisdiction under 28 U.S.C. § 1291. We must uphold a jury

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

verdict if it is supported by substantial evidence. *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017). We affirm.

Substantial evidence supports the jury's verdicts for Officer Koerber and Sergeant Lawrence. *See id.* (substantial evidence is "evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion by denying Kenney's post-trial motions because Kenney failed to identify the specific grounds for his motions or to show that he was entitled to relief from judgment, to alter or amend the judgment, or that a new trial was warranted. *See* Fed. R. Civ. P. 59(a), 59(e), 60(b); *Kerr v. Jewell*, 836 F.3d 1048, 1053 (9th Cir. 2016) (standard of review for Rule 59(e) motion to alter or amend the judgment); *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010) (per curiam) (standard of review for Rule 59(a) motion for a new trial); *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004) (standard of review for Rule 60(b) motion for relief from judgment).

Kenney's contentions of judicial bias are unsupported by the record. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

We decline to address matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir.

2009) (per curiam).

Kenney's motion filed on November 30, 2018, Dkt. No. 8, is DENIED to the extent that it seeks relief not already granted by the order filed on January 3, 2019, Dkt. No. 9. Kenney's motions filed on August 16, 2019, Dkt. Nos. 27 and 28; September 11, 2019, Dkt. No. 35; and September 15, 2019, Dkt. Nos. 37, 38, and 39, are DENIED. Kenney's requests for sanctions contained in the motions filed on October 4, 2019, Dkt. No. 44, and October 7, 2019, Dkt. No. 46, are DENIED.

**AFFIRMED.**

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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 JOHN B. KENNEY,

12 Plaintiff,

13 v.

14 KASEYLEE LAWRENCE; and  
15 MATTHEW KOERBER,

16 Defendants.

Case No.: 13cv248-WQH-AGS

**ORDER**

17 HAYES, Judge:

18 The matters before the Court are multiple motions to alter or amend judgment or, in  
19 the alternative, for a new trial filed by Plaintiff John B. Kenney. (ECF Nos. 674, 675, 676,  
20 677, 678, 679).

21 **I. BACKGROUND**

22 On October 21, 2013, Plaintiff filed a First Amended Complaint alleging that he was  
23 deprived of his rights under federal and state law as a result of his involvement with the  
24 Occupy San Diego protests in late 2011 and early 2012. (ECF No. 21). The Complaint  
25 alleged facts describing five incidents involving the San Diego Police Department  
26 ("SDPD"), three named San Diego Police Officers, and Doe San Diego Officers 1-200.  
27 The following claims remained at the time of trial: 1) a claim pursuant to 42 U.S.C. § 1983  
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1 for excessive force and a violation of the First Amendment against Defendant Koerber with  
 2 respect to October 14, 2011 and 2) a claim pursuant to 42 U.S.C. § 1983 for violations of  
 3 the First Amendment and Fourth Amendment against Defendant Lawrence with respect to  
 4 January 31, 2012.

5 On March 27, 2018, a jury trial began on the remaining claims. On April 2, 2018,  
 6 the jury returned a verdict in favor of Defendants Koerber and Lawrence. (ECF Nos. 658,  
 7 661, 662). Judgment was entered in favor of all Defendants on all claims and against  
 8 Plaintiff. (ECF No. 663).

9 On April 30, 2018, Plaintiff filed six motions to alter judgment. (ECF Nos. 674-  
 10 679). On May 21, 2018, Defendants filed responses in opposition. (ECF Nos. 682-687).  
 11 On May 28, 2018, Plaintiff filed replies. (ECF Nos. 688-693).

## 12 II. CONTENTIONS

13 Plaintiff contends that he is entitled to judgment as a matter of law and, alternatively,  
 14 for a new trial pursuant to Federal Rule of Civil Procedure 59(a) and 59(e). Plaintiff asserts  
 15 the following grounds for his Rule 59 motion: (1) the verdicts were against the weight of  
 16 the evidence, (2) the verdicts were insufficient, (3) the verdicts were based on false  
 17 testimony, (4) substantial errors occurred in the admission/rejection of evidence, (5) failure  
 18 to provide jury instructions, and (6) “constitutional grounds, including on rulings on Muni  
 19 Code 54.0110, etc.” *See, e.g.*, ECF No. 674 at 2. Plaintiff further contends that he is  
 20 entitled to relief under Federal Rule of Civil Procedure 60(b). Plaintiff moves for  
 21 reconsideration of the Court’s rulings made before trial and seeks judgment in his favor on  
 22 causes of action and on Defendants dismissed prior to the trial.<sup>1</sup> Plaintiff further asserts  
 23 that he was denied discovery and that the Court has exhibited bias against him.

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 26 <sup>1</sup> Plaintiff does not clearly identify which prior orders are the subject of Plaintiff’s motion for  
 27 reconsideration.

1 Defendants assert that Plaintiff's motions fail to provide any grounds justifying  
2 relief. Defendants contend that Plaintiff is not entitled to a new trial under Rule 59(a).  
3 Defendants assert that the verdicts were sufficient and supported by the weight of evidence  
4 and the verdicts were not based on false testimony. Defendant contends that the Court did  
5 not err in its evidentiary rulings and the Court did not err with respect to any jury  
6 instructions. Defendants contend that Plaintiff fails to provide any evidence or support for  
7 his request for amendment of judgment under Rule 59(e). Defendants contend that Plaintiff  
8 further fails to demonstrate that he is entitled to relief under Rule 60(b). Defendants  
9 contend that any motion for reconsideration of the Court's February 22, 2018 Order  
10 granting summary judgment to the City and the SDPD is untimely and that Plaintiff fails  
11 to provide adequate grounds for relief.

### 12 III. LEGAL STANDARD

13 Federal Rule of Civil Procedure 59 permits the Court to alter or amend a judgment,  
14 or order a new trial. *See* Fed. R. Civ. P. 59(a), (e). Federal Rule of Civil Procedure 59(a)  
15 provides that "[t]he court may, on motion, grant a new trial on all or some of the issues. . .  
16 after a jury trial, for any reason for which a new trial has heretofore been granted in an  
17 action at law in federal court." Fed. R. Civ. P. 59(a). "The trial court may grant a new  
18 trial, even though the verdict is supported by substantial evidence, if 'the verdict is contrary  
19 to the clear weight of the evidence, or is based upon evidence which is false, or to prevent,  
20 in the sound discretion of the trial court, a miscarriage of justice.'" *United States v. 4.0*  
21 *Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999) (quoting *Oltz v. St. Peter's Community*  
22 *Hosp.*, 861 F.2d 1440, 1452 (9th Cir. 1988)).

23 Upon the Rule 59 motion of the party against whom a verdict has been  
24 returned, the district court has 'the duty . . . to weigh the evidence as [the  
25 court] saw it, and to set aside the verdict of the jury, even though supported  
26 by substantial evidence, where, in [the court's] conscientious opinion, the  
27 verdict is contrary to the clear weight of the evidence."  
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1 *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Murphy v. City of*  
 2 *Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990)).

3 Federal Rule of Civil Procedure 59(e) states, “A motion to alter or amend a judgment  
 4 must be filed no later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e).  
 5 A district court may alter or amend judgment under Rule 59(e) if “(1) the district court is  
 6 presented with newly discovered evidence, (2) the district court committed clear error or  
 7 made an initial decision that was manifestly unjust, or (3) there is an intervening change in  
 8 controlling law.” *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001).  
 9 Altering or amending a judgment pursuant to Rule 59(e) is an “extraordinary remedy to be  
 10 used sparingly . . .” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003).

11 Federal Rule of Civil Procedure 60(b) provides,

12 On motion and just terms, the court may relieve a party or its legal  
 13 representative from a final judgment, order, or proceeding for . . . (1) mistake,  
 14 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence  
 15 that, with reasonable diligence, could not have been discovered in time to  
 16 move for a new trial under Rule 59(b); (3) fraud (whether previously called  
 17 intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;  
 18 (4) the judgment is void; (5) the judgment has been satisfied, released or  
 discharged; it is based on an earlier judgment that has been reversed or  
 vacated; or applying it prospectively is no longer equitable; or (6) any other  
 reason that justifies relief.

19 Fed. R. Civ. Proc. 60(b). “A motion under Rule 60(b) must be made within a reasonable  
 20 time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment  
 21 or order or the date of the proceeding.” Fed. R. Civ. P. 60(c). The burden of proof is on  
 22 the party bringing the Rule 60(b) motion. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S.  
 23 367, 383 (1992).

#### 24 **IV. RULING OF THE COURT**

25 With respect to the Defendants and causes of action remaining at trial, Plaintiff fails  
 26 identify the specific grounds for his Rule 59(a) motion and fails to establish that a new trial  
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is warranted under Rule 59(a). The Court concludes that the verdicts returned by the jury in this case are not contrary to the clear weight of the evidence and that no miscarriage of justice has occurred. Plaintiff's motion for a new trial with respect to any causes of action and defendants dismissed prior to trial is denied because no trial took place with respect to these defendants and claims. *See* Fed. R. Civ. P. 59(a). Further, Plaintiff fails to demonstrate that newly-discovered evidence, clear error, manifest injustice, or an intervening change in controlling law warrants any amendment or alteration of judgment under Rule 59(e).

Upon review, the Court also concludes that Plaintiff has not demonstrated that he is entitled to any relief from judgment under Rule 60(b). To the extent Plaintiff requests reconsideration of orders issued by the Court prior to trial, the Court concludes that Plaintiff fails to satisfy his burden of demonstrating that relief under Rule 60 is warranted.

IT IS HEREBY ORDERED that Plaintiff's motions to alter or amend judgment or, in the alternative, for a new trial are DENIED. (ECF Nos. 674, 675, 676, 677, 678, 679).

Dated: May 31, 2018

*William Q. Hayes*  
Hon. William Q. Hayes  
United States District Court

**Additional material  
from this filing is  
available in the  
Clerk's Office.**